



Commonwealth of Massachusetts

State Ethics Commission

One Ashburton Place, Room 619, Boston, MA, 02108
phone: 617-727-0060, fax: 617-723-5851



CONFLICT OF INTEREST OPINION EC-COI-93-16

FACTS:

You were employed by a state agency from 1980 until 1992. For approximately one year, you were in a managerial position where you supervised over 1000 employees who were directly responsible for delivery of services, and you participated in the development of a Request for Proposal (RFP) for the majority of the agency's existing contracts. Specifically, you supervised the staff members who wrote the RFP, and you sat on committees in which its content was reviewed and discussed. After the development of the RFP, the contracting process was halted due to a change in administrations. During that time period, the RFP was reviewed but was not substantially altered. You did not participate further in the contracting process.

You have informed us that ABC, a private entity, has offered you a position that will include the supervision of staff who are implementing contracts awarded to ABC by your former state agency. All of the existing contracts were awarded pursuant to the RFP described above, but not until several months after you left the agency. You have also stated that your position with ABC would involve contracts ABC has with other state agencies. You wish to accept the position offered by ABC.

QUESTION:

May you receive compensation from ABC for your work in connection with the contracts awarded to ABC by your former state agency in 1993?

ANSWER:

No, for the reasons stated below.

DISCUSSION:

As a "former state employee" under G.L. c. 268A you will be subject to the restrictions of §§5 and 23 of G.L. c. 268A.

Section 5

Section 5(a) prohibits you from ever receiving compensation from anyone other than the commonwealth or a state agency in connection with any "particular matter" in which the commonwealth or a state agency is a party and in which you "participated" as a state employee. We have recently stated that our analysis of §5(a) must be faithful to the purpose behind its enactment. That purpose, we have said, "is to bar ... former employees, not from benefiting from the general subject-matter expertise they acquired in government service, but from selling to private interests their familiarity with the facts of particular matters that are of continuing concern to their former government employer." *EC-COI-92-17* (emphasis added).

Participate, as defined in §1(j), requires that the level of participation be personal and substantial.^{1/} Not all participation by a government employee will be deemed to meet this requirement; we have previously stated that participation that is non-determinative and not part of the decision-making process is most likely to be deemed ministerial and insubstantial and, on that basis, will not constitute "participation" under the conflict law. *EC-COI-89-7; In the Matter of John Hickey*, 1983 SEC 158, 159 Although in two early Commission opinions we concluded that "participation in the development of an RFP is not, in and of itself, substantial §participation"

... in the award of the contract,” *EC-COI-79-51*; *see also EC-COI-79-85*, we have subsequently made it clear that the proper focus is on the degree of participation in the contracting process, rather than on the stage of the process in which the participation occurs. *Compare EC-COI-81-113* (advice rendered at a preliminary stage not deemed substantial participation); *83-46* (40 hours spent surveying computer companies to gather information necessary to prepare RFP deemed substantial participation).

Upon reviewing the principles articulated in our earlier opinions and applying them to your facts, we conclude that you participated as a state employee in the contracts awarded to ABC in 1993. Our conclusion is based on your substantial role, either directly or indirectly through the supervision of others, in the drafting of the RFP and in the decision making process concerning its content.^{2/} *See, Graham v. McGrail*, 370 Mass 133 (1976) (participation in discussions involving a particular matter amount to personal and substantial participation); *EC-COI-87-27* (participation will be found if former employee made any decision, determination or approvals, or if you actively supervised or consulted with others in their determinations, decisions or approvals); *EC-COI-89-7* (oversight and tacit approval of the work of direct subordinates can constitute participation within the meaning of the statute). Here, the level of your involvement, we conclude, amounts to “personal and substantial” participation in the RFP and the resulting contract.

The scope of the work you do for ABC is further restricted by other provisions of the conflict law. Specifically, §5(b) prohibits you from appearing for one year before any state agency on behalf of ABC (or any other individual or entity), in connection with any particular matter which was within your “official responsibility”^{3/} as a state employee during the two years prior to the termination of your service. “Official responsibility turns on the authority to act, and not on whether that authority is exercised.” *EC-COI-89-7*; *see also, EC-COI-89-17* (The keynote of official responsibility is the ‘potentiality’ of directing agency action and not the actual exercise of power.”) Thus, §5(b) prohibits you from participating in meetings and negotiating sessions with, or personal appearances before your former state agency or any other state agency in connection with any matter which was within your official responsibility after 1990. *EC-COI-79-73*. We have stated that “personal appearance” would include any telephone calls or correspondence made by you on behalf of ABC in connection with the contracts or other matters which were under your official responsibility during the last two years of your state position. *EC-COI-89-26*; *see also, EC-COI-89-27* (oral or written communications made “with the intent to influence” particular action is a personal appearance; whereas, communications relating “solely to procedure” are probably de minimis communications not triggering the prohibitions of §5(b)). We note that your extensive responsibilities for supervising some state employees will bring a significant number of matters within your area of “official responsibility.”

Section 23

Lastly, your employment by ABC would be restricted by the standards of conduct contained in §23. Section 23(c) prohibits a state employee from disclosing confidential information which she has acquired in her state position or from using such information to further her personal interest. *See, EC-COI-89-23*.

DATE AUTHORIZED: June 22, 1993

^{1/}“Participate,” participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. G.L. c. 268A, §1(j).

^{2/}We note that the RFP you helped to create is substantially the same as the RFP which led to the contracts awarded to ABC.

^{3/}“Official responsibility,” the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and whether personal or through subordinates, to approve, disapprove or otherwise direct agency action. G.L. c. 268A, §1(i).